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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

MORTON E. SCHNEIDER,
Petitioner,

—vs—

ELLIOTT RICHARDSON, SECRETARY OF HEALTH, EDUCATION & WELFARE,
Respondent.

Supreme Court No.
Court of Appeals No. 20,618

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

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THE INLAND PRESS, DETROIT, MICHIGAN

TABLE OF CONTENTS

	Page
1. Opinion Below	1
2. Jurisdiction	2
3. Question Presented	2
4. Statutes, Constitutional Provisions and Regulations Involved	2
5. Statement of the Case	2
6. Reason for Granting Writ of Certiorari	4
Conclusion	20
Appendix A — Opinion of the Sixth Circuit Court of Appeals	1a
Appendix B—Petition for Approval of Attorney Fees	7a

TABLE OF AUTHORITIES

Page

CASES CITED:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967).... 4, 7
Chernock v. *Gardner*, 360 F.2d 257 (3d Cir. 1966)....9, 12, 18, 3a, 4a
Ferry v. *Udall*, 336 F.2d 706 (9th Cir. 1964).....10, 11, 5a
Goodell v. *Flemming*, 179 F. Supp. 806 (W.D.N.Y. 1959) 13
Hobby v. *Hodges*, 215 F.2d 754, 757 (10th Cir. 1954).... 10
Hopkins v. *Cohen*, 390 U.S. 530 (1968)..... 16
Mauldin v. *Gardner*, 264 F. Supp. 370, 372 (D.S.C. 1967) 16
Panama Canal Co. v. *Grace Lines, Inc.*, 356 U.S. 309 (1958) 10, 12, 5a
R.F.C. v. *Bankers Trust Co.*, 318 U.S. 1963 (1943)..... 11
Schilling v. *Rogers*, 363 U.S. 666, 677-78 (1960) 10, 18, 4a, 5a
Watson v. *Celebrezze*, 246 F. Supp. 764 (E. D. Tenn. 1965) 13

STATUTES CITED:

Administrative Procedure Act
5 U.S.C. Sec. 701(a) 4, 5, 8, 9, 17, 2a
Sec. 704 .....5, 8, 2a
Title 42, U.S.C.
Sec. 206 .....9, 17, 18, 3a
Sec. 405 6
Sec. 405(b) .....
Sec. 405(g) 5, 13
Sec. 405(h) 6
Sec. 406 9
Sec. 406(a) 3, 6, 11, 13, 14, 15, 16, 17, 2a, 3a

Page

Sec. 406(b) 16

20 C.F.R. 404.976 ..... 6, 17

Social Security Act

Sec. 206 ..... 17, 18

Sec. 206(a) 11

Sec. 206(b) 16

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, by his attorneys Kelman, Loria, Downing & Schneider prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this matter on April 28, 1971.

1. OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on April 28, 1971 and

judgment in accordance with that opinion hereinafter (set forth in Appendix A) is not yet officially reported.

2. JURISDICTION

The jurisdiction of this court is invoked under Title 28 U.S.C. §1254 (1).

3. QUESTION PRESENTED

Does the court have jurisdiction under 5 U.S.C. §504 of the Administrative Procedures Act to review a social security administration attorney fee determination when the evidence indicates a clear abuse of discretion by the Social Security Administration concerning the allowance of said fees?

4. STATUTES, CONSTITUTIONAL PROVISIONS, AND REGULATIONS INVOLVED.

Statutes cited in table of authorities, page ii.

5. STATEMENT OF THE CASE

In the present case, the petitioner Morton E. Schneider, an attorney represented before the Social Security Administration and hearing examiner, a social security claimant, one George Bisbikis, concerning his claim for social security disability benefits. Plaintiff's fee agreement with his client provided for a contingent fee of 25% of any accrued benefits received by the claimant or his family. Before Mr. Bisbikis consulted plaintiff, his claim for disability benefits had been denied administratively on the ground that his asserted physical impairment was not totally disabling. As indicated in plaintiff's "Petition for Approval of Attorney Fees" (Appendix B) plaintiff's

investigation and evaluation of the matter suggested that Mr. Bisbikis' disability was psychiatric in origin and after considerable discussion with Mr. Bisbikis, plaintiff was able to persuade the claimant to allow plaintiff to request the Social Security Administration to send the claimant for a psychiatric evaluation. This was done and the psychiatrist found the claimant to be disabled on a psychiatric basis and on that premise plaintiff conducted the matter to a successful conclusion before a hearing examiner. The result was that Mr. Bisbikis and his family received an award for past due benefits in the amount of $11,253.70. Plaintiff thereupon petitioned for a fee allowance (See Appendix B) for a fee of 25% or $2,808.42 in accordance with his contingent fee retainer agreement with Mr. Bisbikis.

The hearing examiner allowed a fee of $500 and following an administrative appeal as authorized, the Appeals Council affirmed said allowance.

Petitioner then filed suit in the United States District Court seeking judicial review of said fee allowance. The District Court dismissed the action on the grounds that it lacked jurisdiction to consider such. The appeal was then taken to the United States Court of Appeals for the Sixth Circuit. On April 28, 1971, a decision was rendered by the Court of Appeals with the majority holding: "That the amount of an attorney fee for services performed at the administrative level is a matter of discretion of the Secretary and is not subject to judicial review." Judge McCree dissented holding "I do not agree that Section 206A of the Social Security Act, 42 U.S.C. §406(a), which provides that the Secretary may by rule and regulation prescribe the maximum fees which may be charged for serv-

ices performed in connection with any claims before the Secretary under the sub-chapter, is one of those statutes [which] preclude[s] judicial review under the Administrative Procedure Act, 5 U.S.C. §701(a)."

6. REASONS FOR GRANTING WRIT OF CERTIORARI.

Important Federal questions are presented in this matter as follows:

(a) The holding in this matter by the Sixth Circuit Court of Appeals of non-judicial review under the Administrative Procedure Act of a Social Security Administration attorney fee allowance is in direct contradiction to the decision and principles enunciated therein concerning judicial review of administrative decisions by the United States Supreme Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), wherein the United States Supreme Court stated:

> "* * * judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress . . . *and that only by a showing of clear and convincing evidence of a contrary legislative intent should the court restrict access to judicial review.*" (Emphasis supplied)

(b) The Appellate Court's ruling in this matter of non-reviewability of a Social Security Administration attorney fee allowance, even with evidence being produced that such is arbitrary and a clear abuse of discretion, greatly hinders an individual claimant's ability and right to obtain legal representation on his behalf concerning claims for social security disability benefits.

HOLDING CONTRA TO ABBOTT CASE

As pleaded in Paragraph 1 of plaintiff's complaint, the present suit is brought under the judicial review section of the Administrative Procedure Act, 5 U.S.C. §704, which provides as follows:

> "Agency action made reviewable by statute *and final agency action for which there is no other adequate remedy in a court* are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." (Emphasis supplied)

The Administrative Procedure Act further declares that the provision for judicial review governs throughout the federal administrative establishment "except to the extent that — (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law," 5 U.S.C. §701(a).

The Secretary argues that both exceptions obtain here: (1) that the Social Security Act affirmatively authorizes appeal to the court only by claimants and on matters concerning their entitlement to benefits, 42 U.S.C. §405(g), and that subsection (h) of the same provision "expressly" precludes judicial review of attorney fee allowances; (2) the Secretary further argues that the setting of fees for legal representation of a claimant is, in any event, "com-

mitted to agency discretion by law."

42 U.S.C. §405(h), on which the Secretary relies for his first argument, states:

> "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearings. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this sub-chapter."

This language need not and should not be read as foreclosing judicial review of attorney fee determinations alleged to be grossly inadequate and clearly contrary to the Social Security Act, 42 U.S.C. §406(a), and the agency's own regulations, 20 C.F.R. 404.976. In context it is apparent that the above-quoted provision relates to disputes over Social Security benefit entitlement, not attorney fees. A reading of all the subsections of 42 U.S.C. §405 demonstrates that this is so. Thus, for example, subsection (b) directs the Secretary "to make findings of fact, and decisions as to the rights of any individual applying for payment under this sub-chapter." The terms "findings and decisions of the Secretary," as used in subsection (h) should have the same referent as the identical terms used elsewhere in the same section of the statute, and that referent is *benefit claims*. The purpose and effect of subsection (h), then is not to prevent judicial review but to require that it be pursued according to the procedure outlined in subsection (g) (setting forth requirements of finality of decision, time for appeal, venue, etc.), and not otherwise.

The *in vacuo* interpretation represented by the decision of the Court of Appeals offends a fundamental principle of administrative law, expressed by the United States Supreme Court in *Abbott Laboratories, et al* v. *John W. Gardner, Secretary of Health, Education and Welfare, et al,* 387 U.S. 136 (1967) where the court stated that judicial review of a final agency action by an agreed person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.

In the *Abbott* case the United States Supreme Court at page 1510 stated:

> "The first question we consider is whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. *Board of Governors* v. *Agnew,* 329 U.S. 441, 67 S.Ct. 411, 91 L.Ed. 408; *Heikkila* v. *Barber,* 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972; *Brownell* v. *We Shung,* 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed. 2d 225; *Harmon* v. *Brucker,* 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed. 2d 503; *Leedom* v. *Kyne,* 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed. 2d 210; *Rusk* v. *Cort,* 369 U.S. 367, 82 S.Ct. 787, 7 L.Ed. 2d 809. Early cases in which this type of judicial review was entertained, e.g., *Shields* v. *Utah Idaho Central R. Co.,* 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111; *Stark* v. *Wickard,* 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733, have been reinforced by the enactment of the Administrative Procedure Act, which embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action,

or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701 (a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court,' 5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions,[1] and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L.Ed. 868; see *United States* v. *Interstate Commerce Comm'n*, 337 U.S. 426, 433-435, 69 S.Ct. 1410, 1414-1415, 93 L.Ed. 1451; *Brownell* v. *We shung*, supra; *Heikkila* v. *Barber*, supra. Again in *Rusk* v. *Cort*, supra, 369 U.S. at 379-380, 82 S.Ct. at 794, the court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, Judicial Control of Administrative Action 336-359 (1965).

"Given this standard, we are wholly unpersuaded that the statutory scheme in the food and drug area excludes this type of action. The Government relies on no explicit statutory authority for its argument that pre-enforcement review is unavailable, but insists instead that because the statute includes a specific procedure for such review of certain enu-

[1] See H.R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195: "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

merated kinds of regulations,[2] not encompassing those of the kind involved here, other types were necessarily meant to be excluded from any pre-enforcement review. The issue, however, is not so readily resolved; we must go further and inquire whether in the context of the entire legislative scheme the existence of that circumscribed remedy evinces a congressional purpose to bar agency action not within its purview from judicial review. As a leading authority in this field has noted, 'the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.' Jaffe, supra, at 357.

In this case the Government has not demonstrated such a purpose . . ."

By presumption, then, judicial review is favored, non-reviewability disfavored. Nothing in the language of the Social Security Act suggests that the court should deny review here.

The Secretary and Court of Appeals for the Sixth Circuit, however, relies on *Chernock* v. *Gardner,* 360 F.2d 257 (ed Cir. 1966), in which an attorney was refused judicial review of his fee as fixed by the Social Security hearing examiner. The Court of Appeals ruled that such matters are "committed to that agency's discretion by Section 206 [42 U.S.C. §406], of the Social Security Act and judicial review is therefore precluded by section 10 of the Administrative Procedure Act [5 U.S.C. §701(a)]." Id. at 259.

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[2] Embodied in §§701(e), (f), 21 U.S.C. §§371(e), (f), and discussed hereafter. Section 701(c) provides a procedure for the issuance of regulations under certain specifically enumerated statutory sections. Section 701(f) establishes a procedure for direct review by a court of appeals of a regulation promulgated under §701(e).

The court's reasons for such a conclusion were not clearly, must less convincingly stated. The *Chernock* decision stands essentially as an ipse dixit, embellished by the citation of three cases having nothing to do with attorney fees.

(1) *Schilling* v. *Rogers,* 363 U.S. 666 (1960) holding that the legislative history as well as the clear language of the Trading with Enemy Act showed that Congress intended to preclude judicial review of the administrative disposition of claims by non-resident enemy aliens.

(2) *Panama Canal Co.* v. *Grace Lines, Inc.,* 356 U.S. 309 (1958), holding that the Canal Zone Code commits the reassessment of tolls to the exclusive discretion of the Panama Canal Company. In reaching that conclusion the Court called particular attention to the specialized, cost-accounting nature of the issue.

(3) *Ferry* v. *Udall,* 336 F.2d 706 (9th Cir. 1964), holding that the Isolated Tracts Act grants the Secretary of Interior the sole right to cancel bids for the purchase of public lands.

In each of the above cases cogent reason was shown for barring judicial review. But none was offered in *Chernock.* The mere fact that Congress may have the *power* to deny review (which the court in *Chernock* took pains to emphasize by quoting this from *Hobby* v. *Hodges,* 215 F.2d 754, 757 (10th Cir. 1954): "It is within the power of Congress to provide the conditions under which an administrative proceeding may be reviewed in the courts and to determine their jurisdiction" does not indicate that Congress has chosen to invoke that power with respect to Social Security attorney fee determinations. Likewise, the fact that an agency is clothed with significant discretion

does not imply that its discretion is unlimited and its judgment immune to review. As the court acknowledged in *Ferry* v. *Udall*, supra, at 711:

> "Almost every agency action involves some degree of discretion of judgment. Yet it cannot be said that, for this reason, every agency action is unreviewable."

Unquestionable agency discretion is involved in administering section 206(a) of the Social Security Act, 42 U.S.C. §406(a), directing the Secretary to set the claimant's attorney fee. But it does not follow that the discretion can be exercised capriciously or that the attorney is without judicial remedy if it is so exercised. The Secretary cites no legislative history to suggest that that was the intent of Congress. Nor are there any practical considerations which compel unreviewability. There is, for example, no reason to fear promiscuous appeal of fee awards by claimants' attorneys. Few attorneys have the inclination to litigate such matters, and the effort required to pursue an appeal to the District Court ordinarily will cost more than the disallowed portion of the fee before the agency. Moreover, since the court is not called upon to substitute de novo judgment for that of the Secretary but only to grant relief from *arbitrary* and *unreasonable* determinations, the inducement to appeal is limited to extreme cases. Unless the Secretary acts unfairly in a significant number of instances — which plaintiff certainly does not suggest — there is little basis for fearing a deluge of attorneys' appeals.

A case more pertinent than those cited by the Third Circuit in *Chernock* is *RFC* v. *Bankers Trust Co.*, 318 U.S. 163 (1943). The Court in *RFC* was called upon to consider the meaning and effect of a federal statute directing the

District Court to allow a railroad reorganization trustee "reasonable" fees and expenses within maximum limits to be fixed by the Interstate Commerce Commission. The trustee argued that the statute was unconstitutional in that it denied judicial review of the ICC's decision. But the Supreme Court did not so interpret the statute:

> "We think the Congress did not intend to deny the courts all power of review of Commission action in such cases . . . Our conclusion is that the function committed by the law to the Commission is the ordinary one reposed in a fact finding body and that its findings, supported by evidence, may not be disturbed by a Court. This construction of the Act leaves the court free to decide upon the basis of the Commission's report all questions of law. With respect to the amount set as a maximum the only question of law which can arise is whether there is substantial evidence to support the Commission's finding. If there is not, the court may so hold, set aside the finding and return the matter to the Commission." 318 U.S. at 169-70.

The nature of the question presented on review in *RFC* and in the present case is certainly within the competence and experience of the court, unlike, for example, the complex economic policy/accounting judgments involved in *Panama Canal Co.* v. *Grace Lines, Inc.*, supra. Certainly a court can have no difficulty in identifying an agency-allowed attorney's fee as reasonably compensatory or, on the other hand, as grossly inadequate. There is neither reason for Congress to oppose judicial review or to entrust exclusive authority in the Secretary of Health, Education and Welfare.

Finally, it should be observed that *Chernock* v. *Gardner* was decided under an earlier Social Security Act, one

which limited an attorney's fee to $30 absent a showing of special circumstances. With the Act in that form, Congress could not unfairly have been perceived by the court as wanting to discourage participation by lawyers in the process of claims administration. From such an assumption it is not a long step to preclusion of judicial review of attorney fee allowances. But in its present form, the Act is clearly designed to encourage, or at least to make practicable, the representation of claimants. The Act now mandates "a *reasonable* fee to compensate such attorney for the services performed by him in connection with such claim," 42 U.S.C. §406(a). Given that major change in Congressional policy, *Chernock* must be discounted.

Two other decisions cited by the Secretary are even less persuasive. In both cases, *Watson* v. *Celebrezze,* 246 F. Supp. 764 (E.D. Tenn. 1965) and *Goodell* v. *Flemming,* 179 F. Supp. 806 (W.D.N.Y. 1959), attorney-fee review as sought under the judicial review provision of the Social Security Act itself 42 U.S.C. §405(g), rather than under the Administrative Procedure Act. The district courts held that 405(g) relates to benefit claims and does not affirmatively provide for judicial review of attorney fee awards. In the present case, however, plaintiff relies for his right of review on the A.P.A. Also to be noted is that *Watson* and *Goodell,* like *Chernock,* involved the old restrictive attorney fee policy of Congress rather than the present policy of reasonable compensation.

It is respectively submitted that social security attorney fee determinations, especially in cases of arbitarary abuse of discretion, are judicially reviewable under the general review provisions of the Administrative Procedure Act.

HOLDING ENDANGERS SOCIAL SECURITY DISABILITY CLAIMANT'S RIGHT AND ABILITY TO OBTAIN LEGAL REPRESENTATION.

The Social Security Act, 42 U.S.C. §406(a), provides that:

> "* * * The Administrator may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Administrator under this title, and any agreement in violation of such rules and regulations shall be void. Whenever the Secretary, in any claim before him for benefits under this title, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) *a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.* If as a result of such determination, such claimant is entitled to past-due benefits under this title, the Secretary shall, notwithstanding section 205(i), certify for payment (out of such past due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 percentum of the total amount of such past-due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. * * *" (Emphasis supplied)

It is not contended that the Secretary must in all instances award a 25 per cent contingent fee, even when contractually agreed to by the client. But it is clear in the present case that such a fee was both justified and reasonable, and in any event the $500.00 fee authorized by the Secretary was patently *not* "a reasonable fee to

compensate such attorney for the services performed by him in connection with such claim," as required by the statute.

The Secretary's brief asserts, however, that a fee of $500.00 *is* reasonable inasmuch as it represents something in excess of $30.00 per hour for plaintiff's services as itemized in his fee petition. But that argument completely overlooks two vital factors. First, because of his specialized training and considerable experience in Social Security and medico-legal matters, plaintiff was able to perceive and develop a psychiatric theory of entitlement — not without having to overcome some client resistance (as set forth in the fee petition). Second, the fee awarded, even if it corresponds to a *minimum* hourly rate (and one which, at that, does not take account of experience or specialization), fails entirely to allow for the contingent nature of payment. Customarily minimum fees are charged by attorneys only if they are paid without regard to outcome. The vast majority of Social Security disability claimants, including Mr. Bisbikis, have no financial resources with which to pay any fee. Thus, had plaintiff been unsuccessful in prosecuting Mr. Bisbikis' claim, he would have received no compensation at all for his services. Obviously an attorney will not win every social security case which merits legal representation. If he is awarded only a minimum fee in those cases he does win, while he receives no fee when he loses, it would be uneconomic for an attorney to handle any social security matters. The net effect would be to deprive claimants of legal representation which they need, which they deserve, and which the present Act seeks to encourage. In short, the "reasonable fee" mandated by Congress in section 206(a), 42 U.S.C. 406(a), must be

something more than a bare minimum hourly equivalent. The statutory limitation of contingent fees is not an expression of hostility to such fees but a response to excessively high percentages. See *Hopkins* v. *Cohen,* 390 U.S. 530 (1968).

The decision of non-reviewability in this matter is in direct contrast to the intention of the legislature in enacting 42 U.S.C. §406(a) which generally encourages attorney representations in these matters by allowing attorneys the right to obtain up to 25% of the accrued benefits of the disabled claimant as attorney fees in contrast to the minimal fee allowance attorney fees were granted under the previous statutes.

Section 206(b), 42 U.S.C. §406(b), prescribes the fee allowable for social security claimant representation before the *court*. It states that "whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in exess of 25% of the total of the past-due benefits to which the claimant is entitled by reason of such judgment . . ." While the present case does not involve an adjudication of benefit rights by the court, and section 206(b) is not directly applicable, it is nonetheless significant that Congress requires a "reasonable fee" not to exceed 25% of the accrued benefits in both section 206(a) and 206(b). Clearly the two sections should be read and administered in pari materia. For that reason, what the court stated in *Mauldin* v. *Gardner,* 264 F. Supp. 370, 372 (D.S.C. 1967), though it was speaking of section 206(b), is equally relevant here:

"The court is mindful of the fact that, generally, claimants for social security benefits are for the most part indigent and financially unable to pay an agreed flat fee to employ an attorney to prosecute his claim for benefits in the District Court; further that it is the accepted practice that an attorney represents such claimants on a contingent fee basis whereby he receives a percentage of the past due benefits in the event he is successful in the case, but he receives no fee and possibly no reimbursement for expenses incurred by him in prosecuting claimant's action in the District Court should he fail to prevail.

"Surely an attorney is entitled to a reasonable fee for services rendered his client in prosecuting a claim in this court, and it is as much the court's responsibility to see that a reasonable and adequate fee is paid to the claimant's attorney, as it is to see that such attorney does not receive an unreasonably large or unconscionable fee for his services."

JUDGE McCREE'S PERTINENT DISSENT

The Honorable Wade McCree of the Sixth Circuit Court of Appeals in dissenting from the majority decision in this matter spoke directly to the previously stated issues when he said:

"I respectfully dissent. I agree with the majority's delineation of the issues, but I do not agree that § 206(a) of the Social Security Act, 42 U.S.C. § 406(a), which provides that "the Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, . . ." is one of those "statutes [which] preclude[s] judicial review" under the Administrative Procedure Act, 5 U.S.C. § 701(a).

Clearly § 206 gives the Secretary discretion to set the maximum fees, but I do not read it as barring

judicial review of his exercise of that discretion. The Administrative Procedure Act was enacted to provide uniformly for limited judicial superintendence of administrative agencies' discretionary powers. In accordance with the usual rule for statutory construction, the exceptions to this broad principle should, I believe, be construed narrowly, in order to accomplish the major purpose of the Act. This approach produces a result consistent with the view that judicial review "[r]ests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest". Jaffe, L., The Right to Judicial Review, 71 Harv. L. Rev. 401, 432 (19—). *See also Schilling* v. *Rogers,* 363 U.S. 666, 667-68 (1960) (dissent). Here it seems to me that Congress has not explicitly and clearly indicated that it intended determination of attorney's fees in Social Security disability cases to be exempt from judicial review.

I am aware that this position is contrary to that taken in *Chernock* v. *Gardner,* 360 F.2d 257 (3d Cir. 1966), and other cases cited in the majority opinion. I observe, however, that *Chernock* was decided under a previous version of § 206, and that the Congress has since amended the statute in accordance with a policy of allowing higher fees. P.L. 90-248, § 173 (1968); U.S. Code, Cong. & Adm. News., 90th Cong., 1st Sess., at 993-94. Moreover, the authorities cited by the *Chernock* court were not, in my opinion, apposite to the problem of statutory construction with which we are faced. [footnote omitted] I observe that three of the four cases cited in the majority opinion as following *Chernock* (*Fenix* v. *Finch,* 436 F.2d 831 (8th Cir. 1971); *Conner* v. *Gardner,* 381 F.2d 497 (4th Cir. 1967); *Gardner* v. *Menendez,* 373 F.2d 488 (1st Cir. 1967)) were concerned with the question whether attorney's fees for work done *in connection with judicial review* of the Secretary's decision on

disability claims could be set by the District Court. The seeming acceptance of the *Chernock* holding in these cases was thus dictum.

Of course, I do not suggest that we have the power to consider *de novo* the administrative decisions of the Secretary. Only a clear abuse of discretion can justify our setting aside his decision. Here, in my judgment, appellant has made allegations which, if true, would require a finding of clear abuse. Appellant's client had made a previous application for disability benefits and it had been denied. Appellant devoted 14 hours of legal work to this case, and converted what had been a worthless claim to one which netted his client approximately $11,000 in disability benefits.[3] For this result the Secretary granted him a fee of $500 — an amount roughly equal to the State Bar of Michigan's suggested minimum fee for hourly performance. But attorney's fees should represent not only the amount of time expended but also the nature and extent of the result achieved. Taking this into account, the award seems to me arbitrary and hence an abuse of the Secretary's administrative discretion.[4] Accordingly,

[3] It is undisputed that appellant specializes in representing personal injury, workmen's compensation, and social security claimants, and a legal task requiring 14 hours of his time might require a lawyer of less experience to expend considerably more time.

[4] It should be noted that, in the decision rendered in the United States District Court in the principal case, Judge Kaess, in speaking to this particular issue, stated:

> "He [plaintiff] contends that the $500.00 is inadequate and unreasonable and argues that the discretion of the Secretary was abused by overlooking two vital factors — (1) plaintiff's specialized training and considerable experience in Social Security matters and (2) the contingent nature of the payment.
>
> The two factors pointed out by the plaintiff, plus the fact that the minimum fee suggested by the Michigan State Bar Association is $35.00 per hour, leads this court to believe that a reimbursement of rate of $31.25 per hour, as is reflected in the Secretary's decision, may be inadequate and unreasonable in this situation. Perhaps Mr. Schneider's expertise in this area, coupled with the contingent nature of the payment, should entitle him to something in excess of the minimum Michigan State Bar Association hourly rate."

I would remand the case to the District Court for entry of an order requiring the Secretary to set a reasonable fee."

CONCLUSION

On conclusion for the reasons aforementioned, Petitioner does pray that a Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,
MORTON E. SCHNEIDER
For Kelman, Loria, Downing & Schneider
Attorneys for Plaintiff
2800 Cadillac Tower
Detroit, Michigan

APPENDIX A

No. 20618

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MORTON E. SCHNEIDER,
Plaintiff-Appellant,
v.
ELLIOTT RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 28, 1971.

Before: McCREE, BROOKS and MILLER, Circuit Judges.

PER CURIAM: Plaintiff-appellant, Morton E. Schneider, an attorney, represented a social security claimant at an administrative hearing who was awarded benefits in the amount of $11,233.70. He then filed a petition with the hearing examiner requesting approval of a $2,808.42 legal fee, being twenty-five per cent of the benefits awarded. The hearing examiner allowed a fee of $500 and following an administrative appeal as authorized by 20 C.F.R. 404.975(e), the Appeals Council affirmed. The appellant then brought this action in District Court seeking judicial review. He alleges that his client had agreed to pay him a twenty-five per cent contingent fee, and further that he

was required to spend some fourteen hours in preparing and presenting his client's case and an additional two hours in preparing his own petition for a fee. He brands the fee award of the Secretary as an abuse of discretion because if its alleged inadequacy[4].

The District Court dismissed the action on the grounds that it lacked jurisdiction. This appeal followed and raises the single issue of whether the Social Security Act precludes judicial review of legal fees awarded by the Secretary of Health, Education and Walfare to an attorney who has represented a social security claimant at the administrative level. We affirm the District Court's dismissal of the action.

Appellant contends that the Secretary's award of legal fees is judicially reviewable under 5 U.S.C. §704 of the Administrative Procedure Act providing in part that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . ." However, 5 U.S.C. §701(a) of the Administrative Procedure Act clearly establishes two exceptions to the provisions for judicial review of agency action provided in Section 704. One exception is where "statutes preclude judicial review" and the other, directly on point in this case, is where "agency action is committed to agency discretion by law."

Section 406(a)[5] of the Social Security Act (42 U.S.C.

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[4] Because of our disposition of this case, we do not reach this issue.

[5] Section 406(a) of the Social Security Act provides in part ". . . [t]he Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, and any agreement in violation of such rules and regulations shall be void."

§406(a)) commits to the discretion of the Secretary of Health, Education and Welfare the setting of legal fees for administrative representation of social security claimants. In a factual situation similar to the present case in *Chernook* v. *Gardner,* 360 F.2d 257 (3rd Cir. 1966), it was held ". . . the setting of fees for representation of claimants before the Secretary is committed to that agency's discretion by Section 206 of the Social Security Act, and judicial review is therefore precluded by Section 10 of the Administrative Procedure Act . . ." This decision in *Chernook* that the amount of an attorney's fee for services performed at the administrative level is a matter of discretion with the Secretary and is not subject to judicial review has been cited with approval in recent cases involving attorneys fees for representation in the district courts. *Finix* v. *Finch,* — F.2d — (1st Cir. 1971); *Conner* v. *Gardner,* 381 F.2d 497 (4th Cir. 1967); *Robinson* v. *Gardner,* 374 F.2d 949 (4th Cir. 1967); *Gardner* v. *Menendez,* 373 F.2d 488 (1st Cir. 1967).

Affirmed.

McCREE, Circuit Judge (dissenting). I respectfully dissent. I agree with the majority's delineation of the issues, but I do not agree that §206(a) of the Social Security Act, 42 U.S.C. §406(a), which provides that "the Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this subchapter, . . ." is one of those "statutes [which] preclude[s] judicial review" under the Administrative Procedure Act, 5 U.S.C. §701(a).

Clearly §206 gives the Secretary discretion to set the maximum fees, but I do not read it as barring judicial

review of his exercise of that discretion. The Administrative Procedure Act was enacted to provide uniformly for limited judicial superintendence of administrative agencies' discretionary powers. In accordance with the usual rule for statutory construction, the exceptions to this broad principle should, I believe, be construed narrowly, in order to accomplish the major purpose of the Act. This approach produces a result consistent with the view that judicial review "[r]ests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest". Jaffe, L., The Right to Judicial Review, 71 Harv. L. Rev. 401, 432 (19—). *See also Schilling* v. *Rogers,* 363 U.S. 666, 667-68 (1960) (dissent). Here it seems to me that Congress has not explicitly and clearly indicated that it intended determination of attorney's fees in Social Security disability cases to be exempt from judicial review.

I am aware that this position is contrary to take taken in *Chernock* v. *Gardner,* 360 F.2d 257 (3d Cir. 1966), and other cases cited in the majority opinion. I observe, however, that *Chernock* was decided under a previous version of §206, and that the Congress has since amended the statute in accordance with a policy of allowing higher fees. P.L. 90-248, §173 (1968); U.S. Code, Cong. & Adm. News., 90th Cong., 1st Sess., at 993-94. Moreover, the authorities cited by the *Chernock* court were not, in my opinion, apposite to the problem of statutory construction with which

we are faced.[6] I observe that three of the four cases cited in the majority opinion as following *Chernock* (*Fenix* v. *Finch*, 436 F.2d 831 (8th Cir. 1971); *Conner* v. *Gardner*, 381 F.2d 497 (4th Cir. 1967); *Gardner* v. *Menendez*, 373 F.2d 488 (1st Cir. 1967)) were concerned with the question whether attorney's fees for work done *in connection with judicial review* of the Secretary's decision on disability claims could be set by the District Court. The seeming acceptance of the *Chernock* holding in these cases was thus dictum.

Of course, I do not suggest that we have the power to consider *de novo* the administrative decisions of the Secretary. Only a clear abuse of discretion can justify our setting aside his decision. Here, in my judgment, appellant has made allegations which, if true, would require a finding of clear abuse. Appellant's client had made a pervious application for disability benefits and it had been denied. Appellant devoted 14 hours of legal work to this case, and converted what had been a worthless claim to one which

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[6] Three cases were cited. 360 F.2d at 259. *Schilling* v. *Rogers*, 363 U.S. 666 (1960), holds that the language and legislative history of the Trading With the Enemy Act show that Congress intended to preclude judicial review of the Administrative disposition of claims by non-resident enemy aliens. *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309 (1958), holds that the Canal Zone Code limits the reassessment of tolls to the exclusive discretion of the Panama Canal Company. This case involved a highly technical cost-accounting determination, not a matter like the setting of attorney's fees with which courts have great familiarity. *Ferry* v. *Udall*, 336 F.2d 706 (9th Cir. 1964), holds that the Isolated Tracts Act grants the Secretary of the Interior the sole right to cancel bids for the purchase of public lands. These cases, with which I have no quarrel, clearly hold that Congress may grant administrative agencies unreviewable discretion to make certain kinds of technical and almost political determinations. *See Panama Canal Co., supra*, at 317-18. But they cast little light on the question whether Congress intended to place the Secretary's discretion in setting attorney's fees in Social Security disability cases beyond judicial review.

netted his client approximately $11,000 in disability benefits.[7] For this result the Secretary granted him a fee of $500 — an amount roughly equal to the State Bar of Michigan's suggested minimum fee for hourly performance. But attorney's fees should represent not only the amount of time expended but also the nature and extent of the result achieved. Taking this into account, the award seems to me arbitrary and hence an abuse of the Secretary's administrative discretion. Accordingly, I would remand the case to the District Court for entry of an order requiring the Secretary to set a reasonable fee.

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[7] It is undisputed that appellant specializes in representing personal injury, workmen's compensation, and social security claimants, and a legal task requiring 14 hours of his time might require a lawyer of less experience to expend considerably more time.

APPENDIX B

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE
SOCIAL SECURITY ADMINISTRATION

IN THE CASE OF:

GEORGE P. BISBIKIS,
S. S. NO. 371-32-2489

PETITION FOR APPROVAL OF ATTORNEY FEES

TO: DEPARTMENT OF HEALTH, EDUCATION AND WELFARE
SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS
APPEALS COUNCIL
WASHINGTON, D. C.

Your petitioner, Morton E. Schneider, respectfully states:

1. That he is an attorney at law licensed to practice in the State of Michigan and before the District Court of the United States, Eastern District of Michigan and before the United States Court of Appeals, Sixth Circuit.

2. That petitioner's office was retained by GEORGE BISBIKIS, and his family to represent them in a hearing before the Bureau of Hearings and Appeals relative to Mr. Bisbikis' claim for total and permanent disability benefits.

3. That, in fact, your petitioner, Morton E. Schneider, did represent said George Bisbikis in the preparation and

at the hearing before the Honorable Joseph P. Sitek on December 11, 1968.

4. That as a result of said hearing and subsequent events which will be discussed later in this Petition, a decision was entered by the Hearing Examiner granting disability benefits with the period of disability commencing on April 2, 1965.

5. That your petitioner spent a considerable amount of time on this matter which covered the following areas:

(a) Initial discussions with client concerning the original decisions denying him benefits and filing of a request for a hearing before a Hearing Examiner — 2 hours.

(b) Discussions with doctors in obtaining of numerous medical reports, which were submitted in evidence — one hour.

(c) General preparation for the hearing and discussions with clients concerning such — 3½ hours.

(d) Complete review of the social security file — 1½ hours.

(e) Upon review of the social security file and the medical reports and examinations contained therein, and after considerable discussions with Mr. Bisbikis, it became apparent to the petitioner that there was a strong possibility that Mr. Bisbikis was disabled completely because of psychiatric reasons or on the basis of combined psychiatric and organic reasons. Petitioner therefore discussed with Mr. Bisbikis petitioner's feeling that he should be authorized to ask that the Hearing Examiner request a psychiatric examination and because of the fact that Mr. Bisbikis first refused any type of psychiatric examina-

tion, it was necessary to discuss the matter in great detail with him and his family and attempt to convince them that such was the best procedure to follow on their behalf. Petitioner was ultimately able to convince Mr. Bisbikis and his family and was given authorization to request a psychiartic examination at the time of the hearing — 1½ hours.

(f) Petitioner attended the hearing at which was a vocational expert, who was cross-examined by the petitioner and at said hearing petitioner request a psychiatric examination as indicated aforesaid — 2½ hours.

(g) Such request was granted by the Hearing Examiner and on January 30, 1969, Mr. Bisbikis was examined by a psychiatrist by the name of Joseph L. Kubanek; a copy of report of examination by Dr. Kubanek is attached to the Petition. Petitioner feels that it is clear from Dr. Kubanek's report that Mr. Bisbikis was and is psychiatricly disabled and further that such was either the sole basis of the award entered in this matter or at least the convincing basis for the Hearing Examiner's entry of the award. Review of psychiatrist's report and communication with Hearing Examiner regarding admission of report in evidence —

(h) An appointment with client and discussion regarding dates and amount of accrued benefits received by client with explanation of such to client and checking of benefits to see if correct amounts were received — one hour.

(i) Review of this file in order to prepare this Petition for Attorney Fees and preparation of Petition for Attorney Fees — 2 hours.

6 That this matter was taken by the petitioner on the contingency that a fee was to be paid only if the petitioner

was successful and claimant agreed to pay a fee of 25% of the accrued benefits received to himself or his family as is indicated by the agreement, a copy of which is attached to this Petition.

7. That accrued benefits received by Mr. Bisbikis and his family are in the amount of $11,253.70.

WHEREFORE, Petitioner respectfully requests approval of a fee of 25% of the accured benefits of $2,808.42, which is the sum of money which has been withheld from the wage earner's benefits pending the filing of a Petition for Attorney Fees.

/s/ MORTON E. SCHNEIDER
PETITIONER

ss.
STATE OF MICHIGAN
COUNTY OF WAYNE

On this 13th day of June, 1969, before me, a Notary Public in and for said county and state, personally appeared Morton E. Schneider, petitioner herein, who, being duly sworn, did depose and say that he has read the foregoing petition by him subscribed and that he knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters, he believes them to be true.

/s/ GWENDOLYN CARTER